88-856 (1)

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Questions Presented

1. Whether a district court abuses its power by compelling a local legislator to vote to adopt local legislation in an attempt to remedy violations of the federal constitution where less intrusive means are available.

2. Whether a local legislator is entitled to legislative immunity for his vote on a local ordinance.

3. Whether the First Amendment prohibits a district court from restraining a local legislator from voting on local legislation according to his conscience.

4. Whether it is an abuse of the contempt power for a district court to hold a local legislator in civil contempt for not voting to implement a consent decree to which he did not consent, and which was agreed to by others only after the district court threatened to impose sanctions for contempt.

5. Whether it is an abuse of the contempt power for a district court to hold a local legislator in civil contempt for failing to vote in favor of specific legislation implementing a consent decree when the consent decree imposed no such obligation because it explicitly left intact the legislator's right to exercise legislative discretion.

6. Whether a district court deprives a local legislator of due process of law by adjudging him in civil contempt without giving him the opportunity to prepare a defense, present evidence, and to be heard on each of the foregoing questions.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioner, Yonkers City Councilman Peter Chema, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on August 26, 1988.[1] That judgment and opinion affirmed as to Council-

[1]The parties to the proceeding below were Petitioner Peter Chema, Councilmen Henry Spallone, Nicholas Longo and Edward Fagan, Respondent United States of America, Respondent Yonkers Branch-National Association for the Advancement of Colored People (hereafter "NAACP"), City of Yonkers, Yonkers Board of Education and Yonkers Community Development Agency.

man Chema and the three other councilmen, and affirmed as modified, as to the City of Yonkers, the orders dated July 26 and August 2, 1988 of the United States District Court for the Southern District of New York, directing the councilmen to vote in favor of local zoning legislation, and adjudging them in civil contempt and imposing coercive monetary sanctions and imprisonment, for not doing so.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 856 F.2d 444 (2d Cir. 1988); a copy is reprinted in the Appendix hereto, Exhibit E. The orders of the United States District Court for the Southern District of New York are unreported; they are reprinted in the Appendix hereto, Exhibits A & C.

Jurisdiction

The Court of Appeals' order was entered on August 26, 1988. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

U.S. Const. Art. I, § 6, Cl. 1; U.S. Const. amend. I; U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; and Charter of the City of Yonkers, article III, § C 3-1A are set forth in the Statutory Appendix hereto.

Statement of the Case

The United States brought this case in 1980, claiming that the City of Yonkers (the "City") and the Yonkers Board of Education had intentionally created or maintained racial segregation in the City's housing and schools. On Novem-

ber 20, 1985, the District Court issued its liability ruling, finding that a concentration of subsidized segregated housing in the Southwest section of the City was "the result of a pattern and practice of racial discrimination" by City officials. *United States v. Yonkers Bd. of Ed.*, 624 F. Supp. 1276, 1373 (S.D.N.Y. 1985). On December 28, 1987, the Court of Appeals affirmed the judgment of the District Court. *United States v. Yonkers Bd. of Ed.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, ____U.S.____, 108 S. Ct. 2821 (1988).

In January 1988, Councilman Chema began his third term as a Councilman for the City after having been elected in November 1987. His first two terms as a Councilman occurred during 1980-1984 when he represented the First Ward on the City's West Side, which then contained most of the City's subsidized housing. Appendix p. 1r. None of the court-ordered housing in this case will be built in areas represented by Councilman Chema.

On January 19, 1988, shortly after Councilman Chema took office, the District Court threatened the City with bankrupting fines if it did not comply with the housing remedy order affirmed by the Court of Appeals:

> Yonkers will comply with the housing remedy order [of July 1, 1987, requiring the City to adopt a housing assistance plan, Appendix p. 20j] or it will be in contempt, it will be in bankruptcy . . . Yonkers is in a state of crisis. It is tottering on the brink of having its elected officials replaced by appointed officials . . . I direct that no elected representatives of the City of Yonkers remove himself from the jurisdiction of this Court pending a resolution of this issue.

Appendix p. 8m, 14-15m. On January 28, 1988, the City entered into a Consent Decree, the terms of which required the City to take certain implementing action, including adoption of zoning legislation, which would allow the placement of the court-ordered housing in specified areas:

> The City agrees to adopt . . . legislation . . . providing for zoning changes . . . *provided, however, that such changes are not substantially inconsistent with the character of the area.*

Appendix p. 11 (emphasis added). The City Council voted 5 to 2 in favor of the Consent Decree, with Councilmembers Chema and Henry Spallone casting the two negative votes. Appendix p. 1r.

On June 13, 1988, the District Court issued a Long Term Plan Order which addressed such issues as a legislative package of incentives for developers and the number, distribution and location of court-ordered housing units, as well as affordability and occupancy criteria. Appendix p. 1d. On June 28, 1988, the City Council defeated a resolution that the City would enact such legislation. Appendix p. 2a. Councilman Chema voted against the resolution.

On July 26, 1988, the District Court considered a draft of the Affordable Housing Ordinance (the "Ordinance"), which would have permitted the construction of court-ordered housing in areas not permitted by existing zoning laws. On that same day, the District Court directed the City to enact, on or before August 1, 1988, the legislative package called for by the Consent Decree. The July 26, 1988 order varied the terms of the Consent Decree because it directed councilmembers to vote in favor of the Ordinance as drawn, without regard to whether the Ordinance would create changes substantially "inconsistent with the character of the area." *See* Appendix p. 7l.

The July 26, 1988 order further provided that if the City failed to enact the legislative package by August 1, 1988, each councilmember who failed to vote in favor of the legislation would be fined $500 per day and later imprisoned until the City enacted the legislation or the councilmember changed his vote. Appendix pp. 1a and 1n.

On July 28, 1988, the District Court wrote a letter stating that the July 26, 1988 order would be satisfied if the City Council adopted a resolution, on or before August 1, 1988, committing itself to enact the Ordinance within the minimum time required by state law for public notice and hearing. Appendix p. 1b.

On August 1, 1988, the City Council held a special meeting at which Councilman Chema voted against adoption of the resolution because the Ordinance did nothing for existing housing on the West Side where many minority group members live:

> How can I as an elected official be forced to vote on something that I've never voted on or supported before? I feel my constitutional rights are being violated tonight. I feel we find ourselves in this imbroglio because the judge has turned a deaf ear towards the fact that the remedy is not a remedy that serves the whole city. We need money on the West Side of town to fix up debilitated and severe housing conditions that exist. The decree serves no one well. As I went through the areas of the city I found that the West, many, many Westsiders in my district wanted to see the areas along the waterfront, along Radford Street, along all the areas that I represent, and along all the West Side, to be fixed up.

On August 2, 1988, in open court, Councilman Chema's counsel advised the District Court that he had been retained at 8:00 a.m. that morning, and that an adjournment was necessary to prepare to meet the charge of civil contempt. The District Court denied Councilman Chema's application, adjudged him in civil contempt without a hearing, and ordered him to pay a fine of $500 per day and then, on the tenth day, to be imprisoned until he purged himself of the contempt by voting in favor of the Ordinance. The District Court also held the City in contempt and levied "bankrupting" fines against it. Appendix pp. 14-15c and 2-3g. The District Court also acknowledged the unprecedented character of its July 26th order:

> I know of no parallel for a court to say to an elected official, you are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote. I find that extraordinary.

Appendix p. 29c.

On August 26, 1988, the Court of Appeals affirmed the judgment of the District Court as to the councilmen and affirmed the judgment, as modified, as to the City. The Court of Appeals set a cap of $1 million-a-day on the City's fines. It also stayed the issuance of its mandate until September 2, 1988, to permit application to this Court for a stay of the contempt sanctions pending filing and consideration of a petition for a writ of certiorari. *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), Appendix p. 1e.

On September 1, 1988, this Court granted Councilman Chema's stay application pending the timely filing and disposition of a petition for a writ of certiorari. *United States v. Chema*, ____U.S.____, 109 S. Ct. 14 (1988), Appendix p. 1h.

On September 10, 1988, after the City had paid over $800,000 in fines, faced imminent layoffs of many municipal employees and suspension of essential municipal services, the City Council enacted the Ordinance by a vote of 5 to 2. Councilman Chema voted in favor of the Ordinance. He had paid fines totalling $3,500, none of which has been refunded to him. On September 14, 1988, the District Court stated that the fines were not refundable. Appendix p. 2q. Councilman Chema was not imprisoned.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals' Decision Presents Novel Questions Of Historic Importance Which Were Incorrectly Decided.

This highly controversial case squarely presents this Court with questions of both novel and historic importance warranting review.[2] The Court of Appeals has, in essence, held that a District Court can hold a duly elected local legislator in civil contempt for failing to vote as the district court dictated and against the legislator's conscience. That decision is not only unprecedented, as the District Court itself acknowledged, but wrong.

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[2]Councilman Chema paid $3,500 in fines, and has not received a refund. Thus, he has a concrete interest in the outcome of the case, and the case is not moot. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984) ("As long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute.")

It is wrong because it unnecessarily and profoundly infringes upon individual rights when there exist less intrusive means for the District Court to achieve its worthy goals. The District Court failed to make a balanced, measured response to the City's refusal to adopt the court's legislative package, but instead invoked the extraordinary power of contempt as a first, rather than a last, resort. The result is a provocative and head-on confrontation between individual constitutional rights and inalienable immunities, on the one hand, and the redress of violations of the constitutional rights of others, on the other. Councilman Chema's absolute legislative immunity, free speech protections and due process rights were extinguished, although those rights and the laudable protections of the Fourteenth Amendment could have been accommodated, without extinguishing any of those rights. In sum, the ends do not justify the means.

The Court of Appeals' decision is also inconsistent with the holdings of all seven other Courts of Appeals which, after this Court's decision in *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 404 (1979), have extended absolute immunity to local legislators. Although this Court, in *Lake Country Estates*, expressly reserved to another day the question of whether absolute immunity should be afforded to local legislators, *Id.* at 404, n. 26, that day has come. This Court should accept this case for review to clarify this sensitive area of constitutional law. Local legislators must know whether there are limits to their absolute legislative immunity.

For these reasons, this Court should issue a writ of certiorari to review the Court of Appeals' decision.

II. The District Court Abused Its Contempt Power By Unnecessarily Intruding Upon The Individual Rights Of Councilman Chema.

A federal court may resort to the contempt sanction only when it represents the "'least possible power adequate to the end proposed.'" *Shillitani v. United States*, 384 U.S. 364, 371 (1966) [quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 61, 69 (1821)]. Even when protecting the Fourteenth Amendment rights of one party, the Court must take care to guard the constitutional right of others. To achieve this balancing of rights, remedial measures should be no broader than necessary to correct the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, *reh'g denied*, 403 U.S. 912 (1971). Here, the District Court could have avoided confrontation with the City Council by establishing a "housing commission" or by directly promulgating the Ordinance. *See, e.g., State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 693, *modified on other grounds*, 444 U.S. 816 (1979). Instead, it took the most intrusive course of action by ordering Councilman Chema and the other councilmen how to vote and how not to vote, and punished them for voting and speaking other than as ordered, thereby staging a wholly avoidable conflict with their legislative immunities and First Amendment rights.

Several circuits have applied the balancing principle in the context of cases implicating constitutional rights and remedies for violation of those rights. In *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir.), *amended on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983), the court, in commenting on its framework for mandating remedial measures, stated, "We should fashion the *least intrusive* remedy that will still be effective." 679 F.2d at

1126 (emphasis added). In *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, ____ U.S.____, 107 S. Ct. 2462 (1987), the Ninth Circuit ruled that a court "must not require more of state officials than is necessary to assure their compliance with the Constitution." 801 F.2d at 1089. *See also Gary H. v. Bradley*, 831 F.2d 1430, 1432 (9th Cir. 1987); *Newman v. Alabama*, 683 F.2d 1312, 1320 (5th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983). Finally, the court should avoid "needless confrontation" between the federal judicial power and state or local governments. *Welsch v. Likins*, 550 F.2d 1122, 1132 (8th Cir. 1977).

The District Court's July 26, 1988 order was the alternative *most* intrusive upon Councilman Chema's rights because, as the Court of Appeals itself suggested, Councilman Chema was given no choice but to vote contrary to his conscience, or to resign. The goal of building affordable housing could have been accomplished by other means, recognized by the District Court, which would not have intruded upon Councilman Chema's constitutional rights and legislative immunities.[3] The City and the NAACP, in fact, took the position below that a commission would be far less intrusive than a compelled legislative act.

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[3]Indeed, there is precedent for both the establishment of a commission and direct judicial adoption of legislation. Advisory panels or special masters appointed for the purpose of carrying out remedies in Fourteenth Amendment cases are not unusual. *See, e.g., Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1973), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied sub nom. White v. Morgan*, 426 U.S. 935 (1976) (advisory panel); *New York State Association for Retarded Children v. Carey*, 631 F.2d 162 (2d Cir. 1980); *Wyatt v. Anderholt*, 503 F.2d 1305 (5th Cir. 1974) (special master). Direct court mandate of legislation or regulations and orders to administrative personnel of the state or locality to implement such laws, while less common, is also not without precedent. *See, e.g., State of Washington v. Washington State Commercial Passenger Fishing Vessel Association, supra; Karcher v. Daggett*, 580 F. Supp. 1259 (D.N.J.) (3-judge court), *aff'd, 466 U.S. 910 (1984).*

The Court of Appeals, while acknowledging the rule that a court "must exercise restraint in determining what actions ought to be required of state and local governmental officials," *see, e.g., Rizzo v. Goode*, 423 U.S. 362, 380 (1976), found that "the choice of implementing legislation as a remedy . . . cannot possibly be an abuse of . . . discretion" because "the City agreed in the Consent Judgment to comply with the Housing Remedy Order by the adoption of necessary implementing legislation." 856 F.2d at 454, Appendix p. 21e. However, the Court of Appeals confused the responsibilities of the City as an entity and the City Council as an institution, with the rights and obligations of Councilman Chema as an individual councilman who had voted in January 1988 *not* to accept the Consent Decree and thereafter voted consistently not to implement it.

III. Councilman Chema Is Entitled To Absolute Legislative Immunity For His Legislative Vote.

The District Court's contempt order of August 2, 1988 is invalid because it violates Councilman Chema's absolute legislative immunity.

In *Lake Country Estates*, 440 U.S. at 405-06, this Court held that regional legislators have absolute legislative immunity in adopting a land use ordinance and general plan. Quoting from Justice Frankfurter in *Tenney v. Bandhove*, 341 U.S. 367, 377, *reh'g denied*, 342 U.S. 843 (1951), the Court stated:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to

> the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, [3 L Ed 162], that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

Although this Court expressly reserved the question of local legislative immunity in *Lake Country Estates*, the Court's reasoning for clothing federal, state and regional legislators with absolute immunity, which has "its roots in the parliamentary struggle of 16th and 17th century England" and was "taken as a matter of course by our Nation's founders," *Lake Country Estates*, 440 U.S. at 403, is no less applicable to affording such immunity to local legislators. Indeed, Justice Marshall, in his dissent in *Lake Country Estates*, 440 U.S. 407-08, stated:

> [T]he majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions of a trial" will impede officials in the "'uninhibited discharge of their legislative duty,'" ante, at 405, 59 L Ed 2d at 412, quoting *Tenney v. Brandhove, supra*, at 377, 95 L Ed 1019, 71 S Ct 783, applies with equal force whether the officials occupy local or regional positions.

Moreover, the Third, Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits have extended absolute legislative immunity to local legislators. *See, e.g., Aitchison v. Raffini*, 708 F.2d 96 (3d Cir. 1983); *Reed v. Village of*

Shorewood, 704 F.2d 943 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Kusinich v. County of Santa Clara*, 689 F.2d 1355 (9th Cir. 1983); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *reh'g denied*, 649 F.2d 336, *cert. denied*, 455 U.S. 907 (1982); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980). No Court of Appeals has denied immunity to local legislators since this Court decided *Lake Country Estates*.

The mere threat of suit "may chill legislators in the performance of their duties." *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), *citing Gravel v. United States*, 408 U.S. 606, *reh'g denied*, 409 U.S. 902 (1972), and *Tenney v. Brandhove*, *supra*. It is as likely to inhibit a city councilman's decision-making as it is to inhibit federal, state or regional legislators. As with these particular legislators, the "public good," noted in *Tenney v. Brandhove*, 341 U.S. at 377, requires that a city councilman's decision-making not be inhibited by fear of being hailed into court to face imprisonment and fines for the exercise of his legislative responsibility. The present outcome of this case deters local legislators from freely exercising their legislative duties and conscience. Further, the argument for absolute immunity for local legislators such as Councilman Chema is even stronger here than in *Lake Country Estates*, because Councilman Chema is an elected, not appointed, official, and is answerable to the electorate.

Councilman Chema is entitled to absolute immunity because he acted in a legislative capacity. This and other courts have long applied a functional test to determine whether absolute immunity is applicable in a particular case. In *Westfall v. Erwin*, 484 U.S.____, n. 3, 56 U.S.L.W.

4087 (Jan. 13, 1988), this Court, in an opinion by Justice Marshall, stated:

> In determining the propriety of shielding an official from suit under the circumstances, this Court has long favored a 'functional' inquiry—immunity attaches to particular office functions, not to particular offices.

See also Forrester v. White, 484 U.S. ____, 56 U.S.L.W. 4067 (Jan. 12, 1988) ("Under that approach, we examine the nature of the functions with which a particular official . . . has been lawfully entrusted. . . ."); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-34 (1980) (Virginia Supreme Court, in promulgating the State Bar Code, acted in a legislative capacity and had absolute legislative immunity). Thus, in *Lake Country Estates*, 440 U.S. at 405-06, this Court did not look at the level of government at which the official served, but whether the official acted in a legislative capacity comparable to that of state legislators.[4]

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[4]The assertion in the dissent from the grant of a stay by this Court, that Yonkers' "'extraordinary' system of governance, in which the Council exercises both legislative and executive powers" is a "factual peculiarity" that makes this case "unsuitable for review," does not take into account this functional inquiry test. As stated above, particular functions, not particular offices, are relevant to this inquiry. Furthermore, in *Lake Country Estates*, 440 U.S. at 394 (as acknowledged by Justice Blackmun in his dissent, 440 U.S. at 408), the regional officials possessed both legislative *and* executive powers. Yet, this Court extended absolute legislative immunity to those officials. Moreover, the authority of the Yonkers City Council "is legislative only." Charter of the City of Yonkers, Local Law No. 20-1961, Article III, § C3-1A.

Councilman Chema truly acted within the "sphere of legitimate legislative activity," *Tenney v. Brandhove*, 341 U.S. at 376, in voting on the zoning ordinance. In fact, this Court, in *Tenny*, quoted from *Coffin v. Coffin*, 4 Mass. 1, 27 (1808):

> These privileges are thus secured . . . to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; *but will extend it to the giving of a vote.*

Tenney v. Brandhove, 341 U.S. at 373-74 (emphasis added).

Moreover, the power to enact a zoning ordinance is a legislative function delegated by the New York State legislature. *Kamhi v. Planning Board of Town of Yorkton*, 59 N.Y.2d 386, 389, 452 N.E.2d 1193, 1194, 465 N.Y.S.2d 865, 866 (1983). *See also Village of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974). Thus, Councilman Chema's vote was truly legislative, and he was entitled to absolute immunity. Many lower federal courts have held local legislators absolutely immune from suit for their votes or other actions regarding zoning and land use planning. *See, e.g., Bruce v. Riddle*, 631 F.2d at 280; *Gorman Towers v. Bogoslavsky*, 626 F.2d at 613-14; *Hope Baptist Church of Castle Point v. City of Bellefontaine Neighbors*, 655 F. Supp. 1216, 1221 (E.D. Mo. 1987); *Carroll v. City of Prattville*, 653 F. Supp. 933, 941 (M.D. Ala. 1987); *Davis v. City of Portsmouth*, 579 F. Supp. 1205, 1211 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984).

The cases relied upon by the Court of Appeals, *Bush v. Orleans Parish School Board*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961) ("Bush I"), *Bush v. Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La), *aff'd sub nom., Denny v. Bush*, 367 U.S. 908 (1961) ("Bush II"), *Milliken v. Bradley*, 433 U.S. 267 (1977), and *Griffin v. County School Board*, 377 U.S. 218 (1964), do not support a contrary result. In *Bush I* and *Bush II, supra*, the court did not, as here, compel the legislators to enact any legislation. It also did not dictate to any particular legislator how to vote on proposed legislation. In the original action, *Bush I*, the court found that the Louisiana legislature was acting in an administrative, not legislative, capacity in administering the New Orleans public schools and was, therefore, not entitled to legislative immunity. *Bush I*, 188 F. Supp. at 922. As the court there stated:

> There is no effort to restrain the Louisiana Legislature as a whole, or any individual legislator, in the performance of a *legislative* function. It is only insofar as the lawmakers purport to act as *administrators* of the local schools that they, as well as all others concerned, are sought to be restrained from implementing measures which are alleged to violate the Constitution. Having found a statute unconstitutional, it is elementary that a court has power to enjoin all those charged with its execution. Normally, these are officers of the executive branch, but when the legislature itself seeks to act as executor of its own laws, then, quite obviously, it is no longer legislating and is no more immune from process than the administrative officials it supersedes. As Chief Justice Marshall said in *Marbury v. Madison*, 1 Cranch 137, 170, 5 U.S. 137, 170, 2 L.Ed. 60: "It is not by the office of

> the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing [an injunction] is to be determined." (emphasis in original).

Here, it cannot be denied that Councilman Chema was acting in a purely legislative capacity by virtue of his vote in the City Council. Thus, the *Bush* cases cannot be read so as to negate Councilman Chema's legislative immunity.

Milliken stands for the proposition that remedial measures should be no broader than necessary to correct a constitutional violation. In *Milliken*, the Court stated that "to ensure that federal court decrees are characterized by the flexibility and sensitivity required of equitable decrees, consideration must be given to burdensome effects" and that "[t]here are undoubted practical as well as legal limits to the remedial powers of federal courts . . ." 433 U.S at 280, n.15. Finally, the portion of the opinion in *Griffin* relied upon by the Court of Appeals is pure dictum. There is no discussion in *Griffin* of the question of legislative immunity because the issue was not before the Court.

Councilman Chema's absolute legislative immunity precludes civil contempt sanctions against him.

IV. The District Court's Order That Councilman Chema Vote In Favor Of Local Legislation Violated His Right Of Free Speech.

The District Court's orders violated Councilman Chema's right of free speech, and therefore are invalid, because a vote, particularly a vote in open public session by an elected legislator, is speech protected by the First Amendment.

(A)

The July 26, 1988 order which required Councilman Chema to vote for specific legislation constituted compelled speech, which this Court has long held to be violative of First Amendment rights. Thus, in *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 637 (1942) (refusal to stand and participate in pledge of allegiance is protected speech), the Court held that the right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind, and that compelled speech is as much prohibited by the First Amendment as are attempts to prevent or inhibit speech. *See also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (obliterating patriotic motto on license plate is protected symbolic speech).

The District Court could not compel Councilman Chema how to vote, even if it could require the City Council to pass legislation. The District Court's July 26, 1988 order violated this clear limit between what the City can be required to do and what Councilman Chema as an individual and as a legislator cannot be compelled to do.

The Court of Appeals held that the "council members remain free to express their views on all aspects of housing in Yonkers." 856 F.2d at 444, Appendix p. 28e. This statement is, we respectfully submit, so self-evident and so broadly applicable as to be meaningless. In every compelled speech case the unwilling speaker can disavow the statements he is forced to make or actions he is forced to take. But this does not sanction the District Court's violation of Councilman Chema's First Amendment rights, any more than would legislative infringement of free speech.

(B)

The District Court's July 26, 1988 order is especially repugnant to the Constitution because it is an unconstitutional prior restraint: it directs Councilman Chema to vote "yes" with respect to the legislation and it restrains him, in advance of the vote, from voting "no," under pain of civil contempt.

Prior restraints on speech are the most serious and least tolerable infringements of First Amendment rights. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976). If the threat of subsequent sanctions "chills" speech, *Id.* at 559, then a prior restraint "freezes" it. The main purpose of the First Amendment is "to prevent all such previous restraints . . . as had been practiced by other governments." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). *See also Schenk v. United States*, 249 U.S. 47, 51 (1918) (Holmes, J.).

Because prior restraints are so dangerous, the party defending such a restraint has the "heavy burden" of overcoming "a strong presumption against its constitutional validity." *Nebraska Press Association*, 427 U.S. at 415; *New York Times Company v. United States*, 403 U.S. 713, 714 (1971). Accordingly, "there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden . . . such cases may arise only when the Nation is at war," and the speech poses an immediate threat to American lives. *New York Times Company*, 403 U.S. at 726-27 (Brennan, J., concurring). Here, Councilman Chema's vote on the zoning ordinance obviously neither endangers lives in wartime nor poses an immediate threat to life. The Government, the NAACP and the District Court have failed to overcome the heavy presumption of the prior restraint's invalidity. The Court of

Appeals did not even address this fundamental constitutional issue.

(C)

Even if the District Court's July 26, 1988 order were not a prior restraint, it is still an unconstitutional infringement of Councilman Chema's rights to speak and vote freely. Government restrictions on the rights to speak and vote can survive only where, unlike here, the Government proves that the restrictions are justified by an overriding compelling interest and that less restrictive means to achieve that interest are not available. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, *reh'g denied*, 438 U.S. 970 (1978).

The Government and the NAACP have failed to show that less restrictive means were not available. Indeed, as shown above, less restrictive means were available. Consequently, the District Court's restrictions on Councilman Chema's rights to speak and vote freely were unjustified.

V. The Consent Decree Did Not Bind Councilman Chema Because He Did Not Consent To It.

This case presents the first opportunity this Court has had to consider the important issue of whether a person can be bound by a consent decree to which he did not consent, and which was the product of the District Court's threat to exercise its contempt power. The Court of Appeals' erroneous holding that Councilman Chema is bound by the January 28, 1988 Consent Decree, if left undisturbed, would reverse the principle established by this Court that only a party who had freely consented to a consent decree is obligated by it. *Local Number 93, International Association of*

Firefighters v. City of Cleveland, 478 U.S. 501, 521-22 (1986). *See also Kneeland v. Luce*, 141 U.S. 437, 440-41 (1891) (a stipulation binds only the parties to it).

A consent decree is, by definition, a decree entered by consent of the parties. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *Black's Law Dictionary*, 370 (5th ed. 1979). A court cannot order litigants to settle a case by entering into a consent decree, because such a decree would not be voluntary. "[T]he voluntary nature of a consent decree is its most fundamental characteristic." *Local Number 93, International Association of Firefighters*, 478 U.S. at 522. It is the parties' agreement that serves as the source of the court's authority to enter a consent judgment, and the court cannot enter or enforce a consent judgment against a person who has not consented to it. *United States v. Ward Baking Co.*, 376 U.S. 327 (1964).

Here, the Consent Decree was not voluntary. The Court of Appeals, only four weeks after the decision appealed from, found in a related case that the Consent Decree was entered into only under threat of contempt. "Yonkers entered into the Consent Decree, only after being threatened by the District Court with sanctions for contempt." *Yonkers Racing Corp. v. City of Yonkers*, No. 88-6140, slip op. at 6436 (2d Cir. Sept. 22, 1988), Appendix p. 19k. Indeed, on January 19, 1988, the District Court had threatened the City with bankrupting fines if it did not comply with the housing remedy order.

Faced with the threat to the City of ruinous bankruptcy and actual restrictions of their personal liberty, a majority of councilmen capitulated to the District Court's demands and voted for the Consent Decree on January 28, 1988. Under these circumstances, the Consent Decree was not voluntarily adopted because it was induced by the threat of

contempt and was not consensual. *See Minnesota v. Murphy*, 465 U.S. 420, 443 (1984), *reh'g denied*, 466 U.S. 945 (1984) (a person is deprived of free choice if he is threatened with a substantial sanction if he refuses to respond) (Marshall, J., dissenting). Therefore, Councilman Chema was not bound by the Decree.

The Court of Appeals compounded the District Court's clear error by holding that Councilman Chema was bound by the Decree, even though he had voted *against* it. In so holding, the Court of Appeals cited no authority, 856 F.2d at 457, Appendix pp. 27e-28e, and indeed, could not cite any authority. The Court's holding is premised upon the untenable proposition that a legislative majority can bind the minority to vote a certain way in perpetuity by the simple expedient of passing legislation purporting to compel the entire legislature to vote in that way in the future, thus stripping each minority legislator of the unfettered right to vote as he chooses.

The Court of Appeals' suggestion that Councilman Chema was not compelled by the District Court's order to comply with the Consent Decree because he was "free" to resign his office is contrary to this Court's principle that one cannot be presented with a Hobson's choice of either giving up one's constitutional rights or incurring a crushing penalty. A Hobson's choice is, of course, no choice at all, and is only a thinly veiled form of compulsion. *Uniformed Sanitation Men Association v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968) (city employees cannot be fired for refusing to waive their right against self-incrimination).

Thus, contrary to the Court of Appeals' view, Councilman Chema could not be compelled to choose between giving up his fundamental constitutional rights to free speech and to vote his conscience, or continuing to hold the

public office to which he was duly elected. *See Bond v. Floyd*, 385 U.S. 116 (1966) (Georgia House of Representatives could not exclude a duly elected representative because he had spoken against the Vietnam War and the draft). This is especially true because if Councilman Chema had resigned, then his constituents would have been deprived of their most basic democratic right to "choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting 2 Elliot's Debates 257); *Simmons v. Unites States*, 390 U.S. 377, 394 (1968) (a defendant need not waive his Fifth Amendment privilege against self-incrimination to invoke his Fourth Amendment right).

Absurd as it may seem, the Court of Appeals said, in essence, that an elected official was free to express his political views anywhere *except* the legislative chamber to which he was elected.

VI. The Terms Of The Consent Decree Did Not Warrant The District Court's Order Of July 26, 1988 Directing Councilman Chema To Vote In Favor Of The Ordinance.

The District Court's order of July 26, 1988 to vote for the Ordinance was improper, even if the Consent Decree did bind Councilman Chema, because the order in effect impermissibly changed the terms of the Decree. Contrary to the Court of Appeals' view, the District Court did not merely enforce the terms of the Consent Decree, but instead extended the supposed obligations of the councilmen beyond that imposed by the Consent Decree.

A court can enforce only the terms of a consent decree that the parties explicitly agreed to, and cannot vary the decree by adding, deleting, or altering its provisions. *Local Number 93, International Association of Firefighters v. City*

of Cleveland, 478 U.S. 501 (1986); *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *United States v. Armour & Co.*, 402 U.S. 673 (1971).[5] Parties enter into a consent decree after carefully negotiating agreement on its "precise terms." *United States v. Armour & Co.*, 402 U.S. at 681.

> [I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree.

Local Number 93, International Association of Firefighters, 478 U.S. at 522. It follows that the scope of a consent decree should be narrowly construed because to do otherwise implicates due process rights.

> Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be constued as it is written, and not as it might have been written.

United States v. Armour & Co., 402 U.S. at 682.

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[5]The only exceptions to this rule are inapplicable here. These exceptions are that a court may modify a consent decree over the objections of one of the parties where a change in the law brings the decree's terms into conflict with the statute pursuant to which the decree was entered, or there have been changed circumstances which would frustrate the parties' purposes if the decree were not modified. *Local Number 93, International Association of Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984); *System Federation No. 9 v. Wright*, 364 U.S. 642, 646-47 (1961). Here, there have not been any changed circumstances or changes in the law. Therefore, the District Court was without authority to alter the decree.

Here, the District Court violated these principles by altering the Consent Decree to deny the City the right preserved by the Decree to adopt only zoning changes that "are not substantially inconsistent with the character of the area." Appendix p. 71. The July 26, 1988 order did not permit councilmembers to take into account the traditional purposes of the exercise of the police power in zoning "to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). The Consent Decree expressly reserved the City's right to make such legitimate judgments, but the July 26, 1988 order deprived the City Council of that right, and therefore, the remedy was broader than necessary to remedy the constitutional violation.

Councilman Chema was held in contempt because he voted against the Ordinance, even though the Consent Decree required only zoning which would not cause substantial changes to the affected neighborhoods. Accordingly, the Court of Appeals was wrong when it framed the issue as one involving an obligation undertaken and later repudiated. 856 F.2d at 457. By removing all discretion from Councilman Chema, the July 26, 1988 order went so far beyond the Consent Decree that the invocation of the contempt power to coerce the enactment of the legislation was improper.

VII. The Judgment Of Contempt Against Councilman Chema Violated Due Process.

Councilman Chema was entitled to due process, including notice of the charge against him and the facts upon which it was based. *In the Matter of Kitchen*, 706 F.2d 1266 (2d Cir. 1983). *See also* Rule 43(a) of the Eastern and Southern Districts of New York. Councilman Chema fur-

ther had the rights to counsel, a reasonable time to prepare a defense, and the opportunity to present his evidence and his view of the legal issues. *In Re Dibella*, 518 F.2d 955 (2d Cir. 1975); *In Re Sadin*, 509 F.2d 1252 (2d Cir. 1975); *In the Matter of Kitchen, supra.* The Government bore the burden of proving Councilman Chema's alleged civil contempt by clear and convincing evidence. *In the Matter of Kitchen, supra; In Re Sutter*, 543 F.2d 1030 (2d Cir. 1976).

The District Court failed to provide Councilman Chema with the foregoing procedural safeguards. Councilman Chema's counsel, who had been retained only two hours before the July 26, 1988 proceedings before the District Court, was not given reasonable and sufficient time to prepare to address the validity and legality of the July 26, 1988 order.

The proceeding itself was highly irregular. No witnesses were sworn and no examination of witnesses took place. The District Court did not require the Government to prove anything, nor did the Government do so. Indeed, the court's offer of a hearing which was to take place only after Councilman Chema would have been found in contempt would have been a mockery of justice.

The burden of proof was impermissibly shifted to Councilman Chema even though the Government had not met its burden of going forward.

The Court of Appeals found that "it would have been preferable . . . for the District Court to have accorded counsel at least a few days to prepare their defenses." 856 F.2d at 453. Given the substantial issues presented by the District Court's unprecedented orders, due process required that Councilman Chema be given more than two hours to prepare a defense.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Dated: New York, New York
November 23, 1988

Respectfully submitted,

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Statutory Appendix

U.S. Const. Art. I, § 6, Cl. 1

> The Senators and Representatives . . . shall in all cases, except Treason, Felony and Breach of the Peace be privileged from Arrest during their Attendance . . . and for any Speech or Debate in either House, they shall not be questioned in any other Place.

U. S. Const. amend. I

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Charter of the City of Yonkers, article III, § C 3-1A.

Legislative powers vested in the City Council.

All the legislative powers of the city, however, conferred upon or possessed by it, are hereby vested in and shall continue to be vested in a Council to be known as "The City Council of the City of Yonkers," . . . and its authority,

except as otherwise provided in this Charter, or by law, is legislative only.